

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Sunbeam Television Corporation
1401 79th Street Causeway
Miami, Florida 33141

Plaintiff,

vs.

Federal Communications Commission
Room 8-A471
445 12th Street, SW
Washington, DC 20554

Defendant.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

Case:
Assigned To:
Assign. Date:
Description:

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Preliminary Statement

1. This is an action under the Freedom of Information Act, as amended, 5 U.S.C. § 552 ("FOIA"), for declaratory, injunctive, and other appropriate relief, seeking, principally, the immediate production of agency records requested by Sunbeam Television Corporation ("Sunbeam") from defendant Federal Communications Commission (the "FCC").

2. The FCC has violated FOIA by: (i) failing to respond to Sunbeam's request for records within the time period mandated by FOIA; (ii) failing to respond to Sunbeam's administrative appeal within the time limits mandated by FOIA; and (iii) failing to produce the requested records as mandated by FOIA.

3. Sunbeam seeks: (i) a declaration that the records sought are subject to disclosure under FOIA; (ii) affirmative injunctive relief requiring the FCC to conduct immediately an

adequate search for the requested records and produce all responsive records; and (iii) an award of reasonable attorneys' fees and other litigation costs.

Jurisdiction and Venue

4. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

5. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

6. Declaratory relief is authorized by 28 U.S.C. §§ 2201-2202 and Rule 57 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 57.

Parties

7. Plaintiff Sunbeam is a Florida corporation with its principal place of business located at 1401 79th Street Causeway, Miami, Florida 33141. Sunbeam is the licensee of commercial television station WSVN(TV), FCC Facility ID No. 63840 ("WSVN"). WSVN's community of license is Miami, Florida.

8. Defendant, the FCC, is an independent United States government regulatory agency. The FCC is an agency within the meaning of 5 U.S.C. § 552(f)(1).

Factual Allegations

9. On September 29, 2004, Sunbeam filed its Application for Renewal of License for WSVN, File No. BRCT-20040929AKH (the "Renewal Application"), with the FCC, which the FCC "accepted for filing" on September 30, 2004. The current status of the Renewal Application is "pending" because the FCC has taken no action on the Renewal Application.

10. On March 3, 2008, counsel for Sunbeam sent, via e-mail, a FOIA request on Sunbeam's behalf to the FCC (the "FOIA Request") pursuant to § 0.461 of the FCC's rules. The FOIA Request sought "copies of any and all documents, and all other materials, relevant to the

Commission's processing and consideration of WSVN's license renewal, including, but not limited to, any allegations that WSVN broadcast potentially indecent programming." A copy of the FOIA Request is attached as Exhibit A.

11. On March 5, 2008, counsel for Sunbeam received an e-mail from Patricia Quartey, a member of the FCC's staff, acknowledging FCC receipt of the FOIA Request and providing an anticipated response date by the FCC of April 1, 2008 (the "FCC Acknowledgement"). The FCC Acknowledgement is attached as Exhibit B.

12. No further response from the FCC was received by counsel for Sunbeam on or before April 1, 2008. Therefore, by operation of FOIA, the request was deemed denied.

13. On April 3, 2008, counsel for Sunbeam filed a "Review of Freedom of Information Action" with the FCC (the "FOIA Appeal"). The FOIA Appeal sought entire, unredacted copies of all documents responsive to the FOIA Request. The FOIA Appeal is attached as Exhibit C.

14. On May 7, 2008, counsel for Sunbeam received a telephone call from William Knowles-Kellet, Esq., an FCC staff member, informing counsel for Sunbeam that the FCC would provide documents in response to the FOIA Request within one or two weeks. In addition, counsel for Sunbeam and Mr. Knowles-Kellet discussed the scope of Sunbeam's FOIA Request.

15. To date, the FCC has failed to respond to the FOIA Request or to the FOIA Appeal. Under 5 U.S.C. § 552(a)(6)(A)(i), the FCC had 20 days from its receipt of the FOIA Request, or until March 31, 2008, to determine whether to comply with the request and immediately notify Sunbeam of such determination and the reasons therefor, and of Sunbeam's right to appeal to the head of the FCC any adverse determination. Under 5 U.S.C. §

552(a)(6)(A)(ii), the FCC had 20 days from its receipt of the FOIA Appeal, or until May 1, 2008, to make a determination with respect to the appeal.

16. Sunbeam is therefore deemed to have exhausted its administrative remedies under FOIA. *See* 5 U.S.C. § 552(a)(6)(C)(i).

Counts for Relief

Count One: Failure to Provide Responsive Records

17. Sunbeam realleges and incorporates paragraphs 1-16.

18. On March 3, 2008, Sunbeam properly submitted a request to the FCC for records that are public records subject to FOIA.

19. On April 3, 2008, Sunbeam properly filed an administrative appeal with the FCC after the FCC failed to provide any substantive response to Sunbeam within the mandatory time limits prescribed by 5 U.S.C. § 552(a)(6)(A)(i).

20. The FCC's failure to make a determination, and notify Sunbeam thereof, with respect to the FOIA Request within the prescribed time limits is improper and violates FOIA.

Count Two: Failure to Make a Determination Within the Statutory Time Limits

21. Sunbeam realleges and incorporates paragraphs 1-20.

22. On March 3, 2008, Sunbeam properly submitted a request to the FCC for records that are public records subject to FOIA.

23. On April 3, 2008, Sunbeam properly filed an administrative appeal with the FCC after the FCC failed to provide any substantive response to Sunbeam within the mandatory time limits prescribed by 5 U.S.C. § 552(a)(6)(A)(i).

24. The FCC's failure to make a determination with respect to the FOIA Appeal within the prescribed time limits is improper and violates FOIA.

WHEREFORE, Sunbeam respectfully requests that this Court:

- A. Declare that the FCC's failure to provide responsive documents is unlawful under FOIA.
- B. Declare that the FCC's failure to make a determination with respect to the FOIA Request and notify Sunbeam thereof within the statutory time limit is unlawful under FOIA.
- C. Declare that the FCC's failure to make a determination with respect to the FOIA Appeal within the statutory time limit is unlawful under FOIA.
- D. Enter an affirmative injunction that directs the FCC to search for and make all requested records available to Sunbeam, unredacted, and without any further delay.
- E. Award Sunbeam reasonable attorneys' fees and other litigation costs.
- F. Grant Sunbeam any further relief this Court deems just and proper.

Respectfully Submitted,



By Charles R. Naftalin (DC Bar No. 394435)
Charles D. Tobin (Bar No. 15919)
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W.
Suite 100
Washington, D.C. 20006
(202) 955-3000 Phone
(202) 955-5564 Fax
Counsel for Plaintiff

Exhibit A

FOIA Request

Brown, Leighton T (WAS - X77161)

From: Brown, Leighton T (WAS - X77161)
Sent: Monday, March 03, 2008 4:07 PM
To: 'FOIA@fcc.gov'
Subject: Freedom of Information Act Request

Attachments: FOIA Request for WSVN(TV)(3-3-08).pdf



FOIA Request for
WSVN(TV)(3-3-...

Please see the attached Freedom of Information Act Request made on behalf of Sunbeam Television Corporation, licensee of WSVN(TV) (Facility ID No. 63840).

Sincerely,

Leighton T. Brown
Holland + Knight

Holland & Knight LLP
2099 Pennsylvania Avenue, N.W.
Suite 100
Washington, D.C. 20006-6801

Main 202 955 3000
Direct 202 457 7161
Fax 202 955 5564
Email Leighton.Brown@hklaw.com

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March 3, 2008

LEIGHTON T. BROWN
202-457-7161
leighton.brown@hklaw.com

Federal Communications Commission
445 12th Street, S.W.
Room 1-A836
Washington, DC 20554

Re: **Freedom of Information Act Request**
Application for Renewal of License for WSVN(TV), Miami, Florida
(Facility ID No. 63840)

We have reason to believe that the Commission has certain documents regarding WSVN(TV), Miami, Florida which are delaying the grant of WSVN's license renewal application, which was filed on September 29, 2004 (see File No. BRCT-20040929AKH). Therefore, pursuant to 47 C.F.R. § 0.461, and on behalf of Sunbeam Television Corporation, the licensee of WSVN, we respectfully request copies of any and all documents, and all other materials, relevant to the Commission's processing and consideration of WSVN's license renewal, including, but not limited to, any allegations that WSVN broadcast potentially indecent programming.

Currently, the maximum search and copying fee we are willing to pay is \$500.00.

We do not believe that the requested records are the kinds listed in 47 C.F.R. § 0.457, or that the records have been withheld from inspection under 47 C.F.R. § 0.459.

In the event there are any questions concerning this request, please contact the undersigned.

Respectfully submitted,

HOLLAND & KNIGHT LLP



Leighton T. Brown
Counsel for Sunbeam Television Corporation

Exhibit B

FCC Acknowledgement

Brown, Leighton T (WAS - X77161)

From: Patricia Quartey [Patricia.Quartey@fcc.gov] on behalf of FOIA [FOIA@fcc.gov]
Sent: Wednesday, March 05, 2008 7:54 AM
To: Brown, Leighton T (WAS - X77161)
Cc: Shoko Hair; Patricia Quartey
Subject: RE: Freedom of Information Act Request

Follow Up Flag: Follow up
Flag Status: Completed

Dear Mr. Brown:

This acknowledges receipt of your Freedom of Information Act (FOIA) request filed with the Federal Communications Commission (FCC). Your request has been assigned FOIA control number 2008-315. Agencies are allowed 20 working days to respond to your request, extending this period for an additional 10 working days under certain circumstances. See 5 U.S.C. § 552(a)(6)(A)(i) and 5 U.S.C. § 552(a)(6)(B)(i). We anticipate responding to your request on 04/01/08. If additional time is needed to respond to your requests you will be notified.

If you have any questions concerning this notice, please call the FOIA Office at 202-418-0440.

FCC FOIA Office

-----Original Message-----

From: Leighton.Brown@hklaw.com [mailto:Leighton.Brown@hklaw.com]
Sent: Monday, March 03, 2008 4:07 PM
To: FOIA
Subject: Freedom of Information Act Request

Please see the attached Freedom of Information Act Request made on behalf of Sunbeam Television Corporation, licensee of WSVN(TV) (Facility ID No. 63840).

Sincerely,

Leighton T. Brown
Holland + Knight

Holland & Knight LLP
2099 Pennsylvania Avenue, N.W.
Suite 100
Washington, D.C. 20006-6801

Main 202 955 3000
Direct 202 457 7161
Fax 202 955 5564
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confidence in order to preserve the attorney-client or work product privilege that may be available to protect confidentiality.

Exhibit C

FOIA Appeal

Please Date Stamp and Return To
HOLLAND & KNIGHT LLP

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Freedom of Information Act Request of)
Sunbeam Television Corporation,)
For Records Concerning the Commission's)
Processing and Consideration of the License)
Renewal Application of WSVN(TV))

FOIA Control No. 2008-315
Facility ID No. 63840

FILED/ACCEPTED

APR - 3 2008

Federal Communications Commission
Office of the Secretary

TO: Office of General Counsel

REVIEW OF FREEDOM OF INFORMATION ACTION

Sunbeam Television Corporation ("Sunbeam"), the licensee of WSVN(TV), Miami, Florida, through its attorneys, and pursuant to Sections 0.461¹ and 1.115² of the Commission's rules, hereby submits its application for review of the Commission's denial, due to its complete failure to respond, of a Freedom of Information Act³ ("FOIA") request.

I. Factual Background

On March 3, 2008, counsel for Sunbeam e-mailed a FOIA request to the Commission requesting "copies of any and all documents, and all other materials, relevant to the Commission's processing and consideration of WSVN's license renewal, including, but not limited to, any allegations that WSVN broadcast potentially indecent programming." Sunbeam's primary purpose for filing the FOIA request was to receive information regarding the Commission's failure to grant WSVN's license renewal application (File No. BRCT-

¹ 47 C.F.R. § 0.461.

² 47 C.F.R. § 1.115.

³ 5 U.S.C. § 552.

20040929AKH), which was filed on September 29, 2004, accepted for filing on September 30, 2004, and, more than three and a half years later, still remains "pending."

On March 5, 2008, counsel for Sunbeam received an e-mail from the Commission acknowledging receipt of Sunbeam's FOIA request and providing an anticipated response date by the Commission of April 1, 2008. Under both FOIA⁴ and section 0.461(g) of the Commission's rules,⁵ the Commission was required to provide its response no later than March 31, 2008.

To date, the Commission has failed to make any further contact with Sunbeam or its counsel. The Commission has neither provided documents in response to Sunbeam's FOIA request nor articulated a denial of the request.

II. Summary of the Argument

Even though Sunbeam abided by all statutory and Commission requirements in submitting its FOIA request, the Commission has failed to provide a timely, statutorily-mandated response. This failure constitutes a violation of FOIA, along with the rules which effectuate it, and provides Sunbeam with the right to bring this application for review. In addition, FOIA requires that the Commission provide access to the requested documents unless the Commission can show that the relevant records fall within one of the narrow, explicitly-defined exemptions contained in the statute. Here, the Commission has failed to do either.

Therefore, the Commission must now provide an adequate, lawful response to Sunbeam's FOIA request by providing access to entire, unredacted copies of any and all documents, and all other materials, relevant to the Commission's processing and consideration of WSVN's license renewal, including, but not limited to, any allegations that WSVN broadcast potentially indecent

⁴ See 5 U.S.C. § 552(a)(6)(A)(i).

⁵ 47 C.F.R. § 0.461(g).

programming. In the alternative, the Commission should declare that no such information or documents exist.

III. Applicable Legal Standards

FOIA is a broad disclosure statute which evidences a “strong public policy in favor of public access to information in the possession of federal agencies.”⁶ It provides that “[e]ach agency *shall make available to the public information*” through regulatory procedures.⁷

Congress provided that nothing in FOIA should be read to “authorize withholding of information or limit the availability of records to the public, except as specifically stated” in the Act.⁸ FOIA thus requires agencies to comply with requests to make their records available to the public unless the particular information in those records is exempted by clear statutory language.⁹

Moreover, the nine exemptions to disclosure set forth in FOIA are to be construed as narrowly as possible to provide maximum access to agency information.¹⁰ A government agency, therefore, must show that there is no genuine issue as to whether it properly invoked the statutory exemptions authorized under FOIA.¹¹ In sum, the disclosure requirements of FOIA must be construed broadly, the exemptions narrowly,¹² and the burden of proof is upon the party seeking to invoke an exemption from mandatory disclosure.¹³

⁶ *Cochran v. U.S.*, 770 F.2d 949, 954 (11th Cir. 1985)(quoting *Brown v. F.B.I.*, 658 F.2d 71, 73 (2d Cir. 1981)).

⁷ 5 U.S.C. § 552(a) (emphasis added).

⁸ 5 U.S.C. § 552(c); see *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976).

⁹ 5 U.S.C. §§ 552(a) and (b); *Akin, Gump, Strauss, Hauer & Feld v. Dep't of Justice*, 503 F.Supp.2d 373, 378 (D.D.C. 2007); *Oglesby v. Dep't of Army*, 79 F.3d 1172, 1176 (D.C.Cir. 1996).

¹⁰ *Akin*, 503 F.Supp.2d at 378; *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C.Cir. 1973).

¹¹ *Akin*, 503 F.Supp.2d at 378.

¹² *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976)(quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1142 (D.C.Cir. 1975)).

¹³ *Environmental Protection Agency v. Mink*, 410 U.S. 73, 80 (1973).

Under FOIA, a federal agency must determine within twenty days (excepting weekends and holidays) after the receipt of a FOIA request whether to comply with such request, and immediately notify the person making the request of its determination and the reasons therefor, as well as the requester's right to appeal to the head of the agency any adverse determination.¹⁴ An agency may, however, under specified "unusual circumstances," extend the prescribed twenty-day time limit by providing written notice which sets forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched.¹⁵ Such a notice may not specify a date that would result in an extension of time for more than ten working days.¹⁶ In addition, an agency may ask the person making the request to agree to an alternative time frame for processing the request.¹⁷

IV. The Commission's Failure to Provide a Timely Response Violated FOIA, Giving Sunbeam the Right to File this Application for Review

As noted, Sunbeam has not received any substantive response to its FOIA request, even though the deadline for the Commission's response has passed. The Commission's failure to provide a response within the applicable time limit provisions constituted an improper withholding of the requested records,¹⁸ and thereby violated FOIA.¹⁹ As a result, Sunbeam had a statutory right to file this administrative appeal.²⁰

¹⁴ 5 U.S.C. § 552(a)(6)(A)(i).

¹⁵ 5 U.S.C. § 552(a)(6)(B)(i).

¹⁶ *Id.*

¹⁷ 5 U.S.C. § 552(a)(6)(B)(ii).

¹⁸ See *Ore. Natural Desert Ass'n v. Gutierrez*, 409 F.Supp.2d 1237, 1248 (D.Ore. 2006) (finding that the agency's reliance on its mootness argument and failure to establish the exceptional circumstances with due diligence exception constituted an untimely determination, resulting in an improper withholding under FOIA).

¹⁹ See *id.* ("... an untimely response is a violation of FOIA ...").

²⁰ See *Jenks v. Marshals Serv.*, 514 F.Supp. 1383, 1387 (S.D.Ohio 1981) (concluding that the agency's failure to respond to the FOIA request within the applicable time limit provisions gave

Although a federal agency need not actually fulfill a FOIA request within the applicable period of time, it is required to notify the requester of its decision whether and how it will comply, its reasons for that decision, and the requester's right to appeal any adverse determination to the agency head.²¹ Here, the only correspondence received from the Commission was its acknowledgement of receipt of Sunbeam's FOIA request. An appropriate FOIA response, however, requires much more of the Commission. It plainly requires a "determination" of whether the agency will "comply" with a request, and a prompt notification of that determination within the applicable time limit provisions.²² The mere acknowledgement of a request is not the equivalent of a "determination,"²³ and the failure to inform an individual of the right to appeal constitutes a failure to reach a determination within the statutory time limitations.²⁴

V. The Commission Must Provide All Records Requested by Sunbeam

As noted, FOIA requires agencies to comply with requests to make their records available to the public unless the particular information in those records is exempted by clear statutory language.²⁵ Here, the Commission has made no attempt to justify the withholding of any of the records requested by Sunbeam in its FOIA request. Moreover, the statutorily-imposed deadline has passed. Consequently, the Commission must promptly provide any and all documents in its possession that are responsive to Sunbeam's FOIA request.

the plaintiff the option to administratively appeal). Under Section 0.461(i)(2) of the Commission's rules, that appeal is to be in the form of an application for review.

²¹ See 5 U.S.C. § 552(a)(6)(A)(i); see, also, *Pollack v. Dep't of Justice*, 49 F.3d 115, 118 (4th Cir. 1995).

²² 5 U.S.C. § 552(a)(6)(A)(i); see *Peck v. C.I.A.*, 787 F.Supp. 63, 65 (S.D.N.Y. 1992).

²³ *Peck*, 787 F.Supp. at 65 (citing *Spannaus v. Dep't of Justice*, 824 F.2d 52, 56, n.9 (D.C.Cir. 1987)).

²⁴ *Hudgins v. I.R.S.*, 620 F.Supp. 19, 21 (D.D.C. 1985).

²⁵ 5 U.S.C. §§ 552(a) and (b); *Akin*, 503 F.Supp.2d at 378; *Oglesby*, 79 F.3d at 1176.

In the alternative, the Commission should declare that it possesses no information relevant to the processing and consideration of WSVN's license renewal.

VI. Conclusion

Based upon the foregoing, Sunbeam respectfully requests that the Commission provide entire, unredacted copies of any and all records relevant to the Commission's processing and consideration of WSVN's license renewal, including, but not limited to, any allegations that WSVN broadcast potentially indecent programming. In the alternative, the Commission must declare that it possesses no information relevant to the processing and consideration of WSVN's license renewal.

Respectfully submitted,

SUNBEAM TELEVISION CORPORATION

By: 

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April 3, 2008

Its Attorneys